SUPREME COURT, U.S.

No. 92-1504

In the Supreme Court of the United States

OCTOBER TERM, 1992

MITRA KOOHI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT V. ZENER
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The court of appeals affirmed the dismissal of damage claims arising out of civilian deaths allegedly caused by defective military weapons systems and operational negligence of the *U.S.S. Vincennes* during combat with Iranian surface vessels. The question presented is whether the United States can be held liable in damages for those actions despite the Federal Tort Claims Act exception for "[a]ny claim arising out of the combatant activities of the military or naval forces * * * during time of war," 28 U.S.C. 2680(j), on the ground that Congress had not formally declared war against Iran at the time of the military's allegedly tortious conduct.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A29, is reported at 976 F.2d 1328. The opinion of the district court, Pet. App. A30-A34, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1992. A petition for rehearing was denied on December 16, 1992. Pet. App. A36-A37. The petition for a writ of certiorari was filed on March 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 3, 1988, an Iranian commercial airliner was shot down by the *U.S.S. Vincennes*, a guided missile cruiser on duty in the Persian Gulf. The plane crashed into the sea near the coast of Iran, resulting in the death of everyone aboard. Petitioners, who assert that they are heirs of the decedents, seek damages for the allegedly wrongful death of the airline passengers and crew.

The *U.S.S. Vincennes* was dispatched to the Persian Gulf during the so-called "tanker war" between Iran and Iraq.[1] Iraq had attacked Iran in September of 1980 in an attempt to resolve by force a boundary dispute between the two countries. Shortly thereafter, Iraq began attacking ships carrying Iranian oil. In 1984, Iran retaliated in kind and attacked ships calling at Arab ports in the Gulf.

In August of 1986, Iran concentrated its attacks on Kuwaiti ships and other ships calling at Kuwaiti ports. The United States, in response to a request from Kuwait, thereafter permitted qualifying Kuwaiti tankers to be registered under the U.S. flag, a step that would bring them under U.S. naval protection. Additional U.S. naval forces, including the

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[1] Our description of historical events leading up to the destruction of Iran Air Flight 655 is based on materials compiled by the Congressional Research Service and the Defense Department's investigation of the matter. The court of appeals took judicial notice of these events, pointing out that they are a matter of historical record, are supported by documentation in the district court record, see C.A. Excerpts of Record (E.R.) Tab 4, Exh. A; *id.* Tab 6, Exh. 1, App. E, and are beyond reasonable dispute. Pet. App. A9 n.1.

Vincennes, were then moved into the Persian Gulf to deter attacks on U.S.-flagged shipping and to further the United States' declared policy of bringing an end to the war between Iran and Iraq.

In the months that followed, U.S. naval forces operating in the Persian Gulf were involved in a number of hostile incidents with the military forces of both Iran and Iraq. On May 17, 1987, an Iraqi warplane launched a missile attack on the *U.S.S. Stark*, killing 37 crewmen and wounding 21. On September 21, Iranian landing craft were observed laying mines near U.S. naval forces sailing in international waters. Two U.S. helicopters opened fire, disabling one of the vessels and killing some of the crew. On October 8, Iranian gunboats fired at a U.S. helicopter. Three helicopters returned fire, sinking one of the gunboats. On October 16, an Iranian surface-to-surface missile struck a U.S.-flagged tanker off the Kuwaiti coast, injuring 18 seamen, including the U.S. captain. The United States responded by destroying an oil platform used by Iran as a base for speedboat attacks on Gulf shipping. On April 14, 1988, a U.S. guided missile frigate struck a mine and was extensively damaged. The United States responded by destroying three Iranian oil platforms, sinking or damaging six Iranian naval vessels during the attack. See Pet. App. A10.

On the morning of July 3, 1988, 13 small Iranian gunboats challenged merchant shipping sailing near the *U.S.S. Montgomery*. The *Vincennes* was ordered to the area to support the *Montgomery* and launched a helicopter to reconnoiter the scene. The helicopter was fired on. The *Montgomery* and the *Vincennes*

headed toward the Iranian gunboats, which then maneuvered in a manner perceived to threaten the ships. The *Vincennes* and *Montgomery* engaged several of the Iranian ships, exchanging gunfire at close range and maneuvering for position at high speed.

Four minutes later, Iran Air Flight 655 took off from the commercial-military airport at Bandar Abbas in Iran and headed on a flight path that would carry it directly toward the *Vincennes*. The flight was immediately detected by the *Vincennes'* radar. Although the plane was emitting transponder signals identifying it as a civilian airliner, the crew of the *Vincennes* believed that the transponder signals it received were associated with a military aircraft. As a result, the *Vincennes* mistakenly identified Flight 655 as an Iranian F-14. The *Vincennes* and the *U.S.S. Sides* issued a series of warnings on military and civil international air distress channels. Flight 655, however, did not respond.

At a range of between 12 and 15 nautical miles, several officers aboard the *Vincennes* reported that the plane was descending in altitude and increasing in speed—changes that gave Flight 655 the appearance of maneuvering for attack. Those reports were incorrect, but the erroneous information was passed on to the *Vincennes'* captain. At 6:54 a.m., after Flight 655 had approached within approximately nine nautical miles, the *Vincennes* launched two missiles and destroyed the airliner.

In the post-accident investigation, the captain of the *Vincennes* reported that the following factors influenced his decision to shoot down the on-coming

plane: (1) the *Vincennes* crew reported that the plane was emitting transponder signals associated with an F-14; (2) the plane had departed from an airfield that previously had been used by Iranian F-14s; (3) the *Vincennes* crew reported that the plane had maneuvered into an attack profile and was closing rapidly; (4) the *Vincennes* was then exchanging fire with Iranian gunboats, and Iranian fighters had supported a naval attack on U.S. vessels the previous April; and (5) visual identification of the plane was not feasible. E.R. Tab 6, Exh. 1, at E47-E48.

The United States government concluded that the *Vincennes* had acted in justifiable self-defense, in accordance with appropriate procedures for protecting military personnel and well-accepted norms of international conduct. In a letter to Congress, President Reagan stated:

> The actions of U.S. Forces in response to being attacked by Iranian small boats were taken in accordance with our inherent right of self-defense, as recognized in Article 51 of the United Nations Charter, and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief.

Letter to the Congress (July 4, 1988), E.R. Tab 4, Exh. C.

A subsequent White House statement elaborated:

> The responsibility for this tragic incident, and for the deaths of hundreds of thousands of other innocent victims as a result of the Iran-Iraq war, lies with those who refuse to end the conflict. A particularly heavy burden of responsibility rests

time of the incident. *See* Petition at 18-20. In addition, they quote extensively from a letter to a magazine written by David Carlson, a Navy officer who was not on the Vincennes at the time of the incident, *in support of the contention that the Persian Gulf was* not "one giant area of military activity." *See id.* at 9-10.[5] Petitioners thus characterize the activities of the United States military in the Persian Gulf as nothing more than a "police action skirmish" (*id.* at 15), and state that the Vincennes faced only "a minor skirmish between vessels lasting for a brief period." *Id.* at 17. However, notwithstanding Mr. Carlson's "minority view," the judicially noticeable facts contained in the record clearly reflect a prolonged period of significant military activity in the Persian Gulf preceding the incident at issue, and fully support the Ninth Circuit's decision.[6] In addition, such factual disputes are irrelevant to whether the Ninth Circuit applied the correct legal standard to the facts, and do not warrant the granting of a writ of certiorari.[7]

Petitioners boldly assert that the Ninth Circuit's decision "is in conflict with all prior decisions of United States Courts dealing

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[5] Although Petitioners represent that this article is "part of the record" (Pet. at 9), neither court below took judicial notice of the article or its contents. In addition, the author of the article expressly acknowledged that his opinions were "the minority view." Pet. App. at A-79.

[6] A detailed partial chronology of the military activities in the Persian Gulf preceding the July 3, 1988 incident is contained in Appendix A hereto. The Ninth Circuit noted that the events at issue herein "are a matter of historical record, are supported by documentation in the district court, and are . . . beyond reasonable dispute." Accordingly, the court took judicial notice of these facts. *Koohi*, 976 F.2d at 1330 n.1. The district court took judicial notice of certain facts, pursuant to requests by all parties. *See* Pet. App. at A-31 and 32. This Court may also take judicial notice of these facts. *See Rautenberg v. United States Dist. Ct.*, 112 S. Ct. 1704, 1704-75 (1992); *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

[7] Pursuant to Sup. Ct. R. 15.1, Respondents bring to the Court's attention, in Appendix B hereto, several additional factual inaccuracies contained in the Petition.

with this issue and in conflict with fundamental international law." Petition at 12. This claimed "conflict" arises only from Petitioners' mistaken assumption that the Ninth Circuit purported to define "war" for all purposes, including "international law." *Id.* at 12 and 14. However, the Ninth Circuit's decision *only* interprets the phrase "time of war" as it appears in a single federal statute for the sole purpose of deciding the narrow domestic tort law issue before it. Petitioners do not cite a *single* case interpreting Section 2680(j), much less one that is in any manner inconsistent with the Court of Appeals' construction of that statute. Instead, Petitioners repeatedly misconstrue the Ninth Circuit's opinion and then argue that the opinion, so misconstrued, contains errors warranting this Court's review.

Thus, Petitioners argue that the Ninth Circuit "has interpreted [Section 2680(j)] to *exclude* 'in time of war' from the exemption ...." Petition at 12 (emphasis added). This is refuted by the opinion itself. The Ninth Circuit did not "exclude" the phrase "time of war," but instead interpreted that phrase to apply to a complex situation involving extensive commitment of military equipment and personnel, combatant activities and several other indicia of war, "at least for purposes of domestic tort law." *See* 976 F.2d at 1335.

Petitioners implicitly concede that a "time of war" may exist although there has been no official declaration by the Congress, arguing only that "some official determination of some type" by the government is needed. Petition at 12. *See also id.* at 16 ("[s]ome public act has always been required").[8] Petitioners

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[8] Courts have repeatedly held that a formal declaration of war by Congress is not required under Section 2680(j). *See Saltany v. Reagan*, 702 F. Supp. 319, 321 n.4 (D.D.C. 1988) (dismissal of claims by Libyan citizens against the President arising out of a 1986 air strike, under FTCA exemptions, including Section 2680(j)), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Roiko v. Abrams*, 338 F. Supp. 46, 47-48 (D. Conn. 1971) (hostilities in Southeast Asia constituted a "time of war" under Section 2680(j) despite absence of a formal declaration by Congress), *aff'd*, 455 F.2d 922 (2d Cir. 1972); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (same).

erroneously claim that the Ninth Circuit did not require any such "official determination," again based upon Petitioners' mischaracterization of the court's decision. In fact, however, the Ninth Circuit stated that, in order for a "time of war" to exist under Section 2680(j), there must be "a deliberate decision by the executive branch" resulting in the engagement of armed forces. *Koohi,* 976 F.2d at 1335. The Ninth Circuit then determined that such a decision had been made herein. *Id.* (the "United States' involvement in naval combat while the Iran-Iraq war was in progress was the result of a deliberate decision on the part of the executive branch to engage in hostile military activities vis-a-vis Iran in order to protect Gulf shipping").[9]

Contrary to Petitioners' assertion (Petition at 21), the record fully supports the Ninth Circuit's conclusion that the Vincennes' actions were the result of a long series of "deliberate actions" by the Executive. For example, Executive Order No. 12170 (1979), initially signed by President Carter, found that "the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." This order was extended in each year preceding the incident, including the extension by President Reagan on November 10, 1987. *See* Request of Defendant the United States to Take Judicial Notice, submitted in support of the motions below to dismiss the complaints (hereinafter the "Request to Take Judicial

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[9] Petitioners acknowledge that "[w]ar is a political act which under all prior cases needed to be determined either by the Legislative [sic] or the Executive under an official pronouncement of some nature." Pet. at 16. This statement illustrates that the issues raised herein are non-justiciable political questions. It also conflicts with Petitioners' attempt to demonstrate the "neutrality" of the United States in the Iran-Iraq war simply by quoting from a judicial opinion. *See* Pet. at 13-14, *quoting Lowry v. Reagan,* 676 F. Supp 333, 336 n.13 (D.D.C. 1987). Moreover, just as war is a political act, a qualitative assessment of the sufficiency of the means and methods by which the Executive and Congress effect, implement and sustain war is also a political question. *See Orlando v. Laird,* 433 F.2d 1039, 1043 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); *Lowry,* 676 F. Supp. at 337 (dismissing action under political question doctrine).

Notice"), Exh. A. *See also* Exec. Order No. 12613, *reprinted in* 3 C.F.R. 256 (1987) (signed by President Reagan, finding that "the Government of Iran is actively supporting terrorism . . . [and] has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations").

Beginning in early 1987, statements by the President and other members of the Executive branch established the United States' policy to maintain the free flow of oil in the Persian Gulf through the use of the United States military, including the reflagging and escort of oil tankers through the Gulf. For example, in January and February 1987, President Reagan reiterated the United States' determination to maintain the flow of oil through the Gulf. Request to Take Judicial Notice, Exh. A. In March 1987, the United States publicly announced plans to reflag eleven Kuwaiti oil tankers, and, in July 1987, the first two such tankers were escorted into the Gulf by Navy vessels. *Id.*

Other pronouncements confirm this "deliberate decision" of the Executive branch. For example, on May 19, 1987, the Assistant Secretary of State stated that, "the United States Government views the continuation of this conflict [in the Persian Gulf], as well as its potential expansion, as a direct threat to our interests." *Assistant Secretary Murphy's Statement,* 87 Dep't of State Bulletin at 60 (July 1987). On May 29, 1987, President Reagan, in an outline of United States policy, stated, *inter alia,* that the United States "must maintain an adequate presence [in the Persian Gulf] to deter and, if necessary, to defend ourselves against any accidental attack or against any intentional attack." *U.S. Policy in the Persian Gulf,* 23 Weekly Comp. Pres. Doc. 601 (June 1, 1987). Moreover, President Reagan made two reports to Congress on events in the Gulf, on October 10, 1987 and October 20, 1987, "consistent with the War Powers Resolution." *See Communications From the President of the United States,* H.R. Doc. No. 113, 100th Cong., 1st Sess. 2 (1987); H.R. Doc. No. 120, 100th Cong., 1st Sess. 1 (1987).[10]

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[10] In addition, members of both houses of Congress manifested their belief that a state of war existed in the Gulf through repeated efforts to

Petitioners assert that "time of war" should be interpreted "in light of the existing law at the time of its enactment in 1946" (Petition at 15), and that "at the time Congress enacted the [FTCA] it was clearly the law that determination of 'war' required some official act of government." *Id.* at 17. Petitioners' inability to cite any authority in support of this assertion is not surprising, because the statutory construction analysis used by the Ninth Circuit — to interpret a statute in its modern context — is widely accepted and has been adopted by this Court. *See, e.g., Taylor v. United States,* 495 U.S. 575, 596 (1990) (Court rejected the application of a maxim of statutory construction — "the rule of lenity" — which would cause an interpretation "at odds with the generally accepted contemporary meaning of a term"); *Consumer Products Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108-09 (1980) (Court looked to common usage of the statutory language as the starting point for its interpretation). Moreover, as previously noted, this argument is inapposite, because the Ninth Circuit did require an official act of government — a deliberate decision on the part of the Executive.

No case cited by Petitioners conflicts with the Ninth Circuit's interpretation of Section 2680(j). That statute was not even at issue in *Navios v. The Ulysses II,* 161 F. Supp. 932 (D. Md. 1958), *New York Life Ins. Co. v. Durham,* 166 F.2d 874 (10th Cir. 1948) or *New York Life Ins. Co. v. Bennion,* 158 F.2d 260 (10th Cir. 1946). Rather, each of those cases involved the interpretation of contracts between private parties which included

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invoke the War Powers Resolution, 50 U.S.C. § 1541, et seq. (1993). *See, e.g.,* H.R.J. Res. 295 and 296, 100th Cong., 1st Sess. (May 28, 1987); S. Res. 1343, 100th Cong., 1st Sess. (June 9, 1987); H.R.J. Res. 310, 100th Cong., 1st Sess. (June 10, 1987); S.J. Res. 194, 100th Cong., 1st Sess. (October 1, 1987); H.R.J. Res. 387, 100th Cong., 1st Sess. (October 22, 1987); S.J. Res. 217, 100th Cong., 1st Sess. (November 10, 1987). Moreover, on August 7, 1987, 110 members of Congress sued the President in an attempt to invoke the War Powers Resolution after three United States warships entered the Persian Gulf on July 22, 1987 and United States forces fired on an Iranian ship laying mines on September 21, 1987. The case was later dismissed based on the political question doctrine and the court's equitable discretion. *See Lowry,* 676 F. Supp. at 337.

a clause regarding war. In any event, these cases are consistent with the Ninth Circuit's holding that no formal declaration of war is required before a state of war may exist and that a phrase must be interpreted within the context in which it appears.

For example, the court in *Navios* stated that the clause at issue should be interpreted as it would be understood by businessmen engaged in the shipping industry (*Navios,* 161 F. Supp. at 941), and that, either under that standard or under the formal rules of international law, a statement by the president of Egypt constituted a declaration of war (*id.* at 943).[11] The issue in *Durham* was the meaning of a clause in an insurance policy restricting coverage for the death of the insured while in the armed forces of a country engaged in war. *Durham,* 166 F.2d at 875. The court stated that private parties may contract as to the meaning of the term "engaged in war," that courts have the duty to construe the term according to that intent and that the parties might contemplate that the country would be engaged in a war that was not politically determined or formally recognized. *Id.* at 876. *Bennion* also involved the interpretation of an insurance policy, which excluded coverage from death resulting from war or any act incident thereto. *Bennion,* 158 F.2d at 261. That court stated, *inter alia,* that "[t]o say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense." *Id.* at 264. The court ruled that a war existed after the bombing of Pearl Harbor but prior to the formal declaration of war by Congress. *Id.*

Petitioners, without elaboration in the body of the Petition, also half-heartedly challenge the Ninth Circuit's dismissal of the claims against the Contractor Defendants on preemption grounds based on the immunity afforded the United States under Section

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[11] In addition, the definitions cited by the *Navios* court (161 F. Supp. at 939 n.6), which Petitioners claim define war as a formal pronouncement by a sovereign state (Pet. at 18), were actually examples of dictionary definitions of the phrase "declaration of war," not "war." This bootstrapping argument thus provides no support to Petitioners.

2680(j). However, Petitioners do not articulate any specific challenge to the Ninth Circuit's preemption analysis, let alone contend that the analysis was contrary to established legal principles.

In fact, the Ninth Circuit's preemption holding is consistent with established law. As the court determined, one of the purposes of Section 2680(j) is "to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." 976 F.2d at 1337. This determination is consistent with the analyses used by other courts facing analogous situations. *See, e.g., In re Agent Orange Product Liability Litigation,* 818 F.2d 145, 150 (2d Cir. 1987) ("To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself."), *cert. denied,* 484 U.S. 1004 (1988); *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986) (warning of the "danger in transporting the rubric of tort law and products liability to a military setting and military technology. . . . What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of [a weapon]"), *cert. denied,* 487 U.S. 1233 (1988).[12]

Accordingly, the Ninth Circuit's conclusion that preemption was proper because imposition of liability on the Contractor Defendants "would create a duty of care where [Section 2680(j)] is intended to ensure that none existed" (976 F.2d at 1337), is consistent with the approach taken by this Court in *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), upon which the Ninth Circuit relied. *Id.*

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[12] *See also Harduvel v. General Dynamics Corp.,* 878 F.2d 1311, 1322 (11th Cir. 1989) ("Although the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense") (Powell, J.), *cert. denied,* 494 U.S. 1030 (1990).

CONCLUSION

The Petition does not identify any significant issue of federal law implicated by the Ninth Circuit's interpretation of Section 2680(j) and its application herein, and Petitioners have cited no case with which the opinion below is in conflict. Petitioners' disagreement with the Ninth Circuit's conclusion that the record in this matter provides a sufficient basis to invoke Section 2680(j) is not an appropriate basis for issuance of a writ of certiorari. Therefore, Respondents respectfully urge that the Petition be denied.

Dated: May 14, 1993

Respectfully submitted,

MATTHEW D. POWERS*
ANN E. DIBBLE
WEIL, GOTSHAL & MANGES
Silicon Valley Office
2882 Sand Hill Rd., Suite 280
Menlo Park, California 94025
Telephone: (415) 926-6200

By: MATTHEW D. POWERS
Attorneys for Respondents
General Electric Company,
GE Aerospace and *RCA Corp.*

JAMES K. MEGUERIAN
D'ANCONA & PFLAUM
30 N. LaSalle St., Suite 2900
Chicago, Illinois 60602
Telephone: (312) 580-2132

By: JAMES K. MEGUERIAN
Attorneys for Respondent
Syscon Corporation

*Attorney of Record

ELLIOT E. POLEBAUM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 639-7067

By: ELLIOT E. POLEBAUM
Attorneys for Respondent
Computer Sciences
Corporation

ROBERT J. STUMPF
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200

By: ROBERT J. STUMPF
Attorneys for Respondent
Varian Associates, Inc.

APPENDIX A[1]

5/17/87: An Iraqi Mirage F-1 fires two Exocet missiles at the U.S.S. Stark, killing 37 U.S. Navy crewmen and wounding 21 others.

6/11/87: A bill is introduced in the House of Representatives authorizing "hazardous duty" payments to U.S. military personnel in the Gulf.

7/9/87: An Iranian gunboat attacks a U.S.-owned, Liberian-flagged tanker near Kuwait.

7/24/87: A re-flagged Kuwaiti tanker being escorted into the Gulf by U.S. Navy vessels hits a mine.

8/10/87: A U.S. F-14 aircraft fires two air-to-air missiles at an Iranian F-4 that is perceived to be threatening a U.S. surveillance aircraft.

8/21/87: An Iranian warship approaches a U.S.-led convoy after the U.S.S. Kidd had fired warning shots across the bow of two sailing vessels, but is deterred by the intervention of a U.S. frigate and helicopters.

8/26/87: The Department of Defense announces that it will make "imminent danger" payments to U.S. military personnel stationed in the Gulf.

9/21/87: U.S. helicopters fire machine guns and rockets at an Iranian ship dropping mines into the Gulf, and capture 26 Iranian crewmen who are later returned via the International Red Cross.

9/24/87: The Senate approves an amendment to the Defense Authorization Bill, S. 1174, that states that the Navy would be justified in sinking any Iranian ship attacking a Navy vessel or any ship carrying U.S. citizens.

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[1] Unless otherwise noted, the following chronology is based on the recitation of events contained in the Congressional Research Service's *CRS Report for Congress*, Pub. No. 88-129 F, *The Persian Gulf, 1987: A Chronology of Events* (1988), attached as Exhibit A to the Request to Take Judicial Notice below.

10/3/87: Four U.S. warships confront 60 armed Iranian speed boats which have been launched against a Saudi Arabian offshore oil field.

10/8/87: Three U.S. military helicopters fire on four Iranian gunboats after the gunboats fired on the helicopters.

10/15/87: An Iranian Silkworm missile hits a U.S.-owned, Liberian-flagged tanker anchored off Kuwait.

10/16/87: Another Iranian Silkworm hits a Kuwait-owned, U.S.-flagged tanker.

10/19/87: Four U.S. destroyers destroy an Iranian oil platform that has been used as a base to launch Iranian speed boat attacks in the Gulf.

11/1/87: A U.S. frigate fires on two speedboats and a dhow that approached a U.S. supply ship as it was escorted out of the Gulf.

4/14/88: The U.S.S. Roberts strikes an Iranian mine in the Gulf.[2]

4/18/88: In response to the attack on the U.S.S. Roberts, President Reagan orders U.S. forces to attack two Iranian oil platforms. While these events are happening, U.S. vessels and military forces are further attacked by Iranian boats, navy vessels, a helicopter and F-14 jets. U.S. forces respond, sinking some Iranian boats and vessels and firing at the F14s.[3]

7/2/88: The U.S.S. Montgomery responds to a distress signal from a Danish tanker under attack by Iranian boats, firing a warning shot which ends the attack.[4]

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[2] *Letter to the Speaker of the House and the President Pro Tempore of the Senate on the United States Military Strike in the Persian Gulf,* 24 Weekly Comp. Pres. Doc. 493 (April 19, 1988).

[3] *Id.*

[4] Request to Take Judicial Notice, Exh. B.

APPENDIX B

Pursuant to Supreme Court Rule 15.1, Respondents identify the following additional misstatements of fact set forth in the Petition:

1. The opinion below refers to these international passengers as 'members of the enemy military or civilian populations' and partially justifies their death on this ground.

Pet. at 4.

The Ninth Circuit made no such determination, nor was it necessary to do so under the court's analysis, which concerned only whether the passengers were "those against whom force [was] directed as a result of authorized military action." *Koohi*, 976 F.2d at 1335.

2. The aircraft, contrary to the misapprehension of the court below, did not fail to communicate its civilian status to the crew of the Vincennes.

Pet. at 5.

The record below clearly supports the finding of the Ninth Circuit. The crew of the Vincennes issued at least three warnings to the aircraft on emergency frequencies. However, no response to any of these warnings was made by the aircraft, despite the specific direction of Iran Air for the crew to monitor the emergency frequency at all times while operating in the Persian Gulf area. *See, e.g.*, Pet. App. at A-50, 51 and 53. (Respondents also note that additional evidence which refutes Petitioners' statement may be found in portions of the ICAO Report of Investigation that were omitted from Petitioners' Appendix, but were included in the record below. *See, e.g.*, Request to Take Judicial Notice, Exh. B, Sections 2.10.8, 2.12.2 and 3.1.14.

3. No meaningful warnings were given to the aircraft basically because the U.S.S. Vincennes was unfortunately not in radio communication with the civilian air network. The U.S.S Vincennes transmitted a series of messages on UHF military guard frequency, 243MHz, a radio frequency not available on international airliners. A few incomprehensible transmissions were made

> by the U.S.S Vincennes on 121.6MHz, the international guard frequency.

Pet. at 5-6.

In fact, the Vincennes issued three challenges to the aircraft on a non-military frequency which contained sufficient information for the crew to identify the target of the challenge. In addition, the U.S.S. Sides issued another challenge on the same frequency which should also have been clearly recognized. *See* Pet. App. at A-53 and 54.

> 4. In briefing below, the United States admitted this duty [of ordinary care toward non-belligerents, including civilian commercial international aviation or civilian commerce on the high seas].

Pet. at 15 & n.5.

The United States made no such admission, stating only that "the Vincennes had an obligation to avoid unwarranted loss of innocent civilian life." Brief of Appellee United States at 26.

> 5. The court below believed that family survivors of passengers have received *ex gratia* payments. Some have, but very few, about ten (10%) percent and in very modest amounts. *Ex gratia* payments were promised in 1988, but most of the plaintiffs herein have received nothing.

Pet. at 23.

Petitioners' attempt to insert the issue of *ex gratia* payments is unavailing. First, as the record reflects and Petitioners acknowledge in the above statement, the United States has offered to make such payments. See Request to Take Judicial Notice, Exh. E. More importantly, this issue is irrelevant to the questions presented by the Petition and played no part in the decision of the Ninth Circuit.